BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ANDREW CLEATUS LANSAW	)	
Claimant	)	
	)	
VS.	)	
	)	
VIEGA LLC	)	
Respondent	)	Docket No. 1,052,240
	)	
AND	)	
	)	
HARTFORD FIRE INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the November 8, 2010, preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore. Joseph Seiwert, of Wichita, Kansas, appeared for claimant. Anemarie Mura, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that claimant suffered a specific injury at work on May 5, 2010, and did not suffer a repetitive use injury. The ALJ further found that claimant failed to give respondent notice of his accident within 10 days and failed to establish just cause for enlargement of the notice period to 75 days. Accordingly, claimant's preliminary hearing requests were denied.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the November 4, 2010, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant contends he suffered a series of accidents through his last day worked and, therefore, his date of accident, under K.S.A. 2009 Supp. 44-508(d), would be August 27, 2010, the date he gave written notice to respondent of his accidental injuries. If the Board finds that claimant suffered a specific injury on May 5, 2010, claimant contends

he gave respondent notice on May 7, 2010, and May 10, 2010, when he reported his medical problems to respondent and left work to obtain medical treatment. Claimant asserts that respondent should have seen the "need to investigate such a workplace accident rather than . . . ignore the reality of a workplace accident."[1] Claimant asserts, therefore, that he is entitled to authorized medical treatment, payment of his past medical bills, and payment of temporary total disability benefits.

Respondent asserts that the ALJ correctly found that claimant did not suffer injuries as a result of a repetitive series, did not give notice of the injury within 10 days, and did not prove he had good cause to extend the notice period to 75 days. Respondent therefore asks the Board to affirm the ALJ's preliminary hearing Order.

The issues for the Board's review are:

(1) Did claimant suffer a specific accident and injury on May 5, 2010, or a series of repetitive injuries?

(2) Did claimant give respondent timely notice of his accident or injuries?

FINDINGS OF FACT

Claimant worked for respondent in its warehouse. His job of loading trucks and building pallets was heavy physical labor which required him to lift from 25 to 120 pounds. On May 5, 2010, claimant was taking product off a shelf, and as he turned to put the product into a tote, he heard a pop.[2] He did not suffer any pain at that time, and he continued to work. He testified that when he heard the pop, he thought that "this was not going to be good,"[3] and he said he knew something was wrong.

The next day, May 6, when claimant woke up, he felt numbness in his right arm and mild pain, which he described as uncomfortable, in his neck and right arm. Claimant went to work that day. His condition stayed uncomfortable during the day as he worked. It did not get any better or worse.

Claimant went to work again on Friday, May 7. Over the course of that day, his right arm condition became increasingly more uncomfortable. He was still feeling numbness in his right arm, hand and thumb. He told his lead man, Calvin Monterey, that he was unable to work and was going to see a doctor because he had an uncomfortable feeling in his right arm. Claimant did not tell Mr. Monterey that his problems were work related, nor did he tell

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[1] Claimant's Brief at 5 (filed Dec. 2, 2010).

[2] Claimant could not say where in his body the pop occurred.

[3] P.H. Trans. at 31.

him about hearing the pop. Claimant saw his personal physician, Dr. Thomas Billings, on May 7, and was told that he probably had a herniated disc that might take up to two weeks to heal. Claimant did not work on May 8 or 9 because it was the weekend. Over the weekend, his condition worsened and became extremely painful. He did nothing over the weekend to aggravate the condition.

On Monday, May 10, claimant returned to work but was in extreme pain. He spoke with Mr. Monterey, told him he was in pain and still had numbness in his right shoulder, and told him what the doctor had said Friday about his having a herniated disc. He told Mr. Monterey that Dr. Billings said it might take two weeks to heal. Mr. Monterey put claimant on a lighter duty job. About lunchtime, claimant called his wife and asked her to get an appointment with Dr. Billings because of the pain in his arm, and his appointment was scheduled for 1:30 p.m. Claimant said there had been no change in his condition from the time he went to work on May 10 until the time he saw Dr. Billings; he was just in extreme pain.

Claimant testified he did not do anything after May 5 to aggravate his condition. He said he just did his job.

Dr. Billings took claimant off work on May 10. Claimant took his off-work slip to respondent and spoke with Joel Kelsinger, his immediate supervisor, and Nick Winsky, respondent's logistic manager. He did not tell them that his condition was work related. Claimant was asked by respondent to bring in a second note from his doctor concerning the amount of time he would be off work, and claimant took that note in to respondent on or about May 24.

On June 28, claimant filled out a form for FMLA. He did not note on the form that his condition was work related. On July 29, 2010, claimant received a call from respondent informing him that he was being terminated because he had exhausted his FMLA time.

Dr. Billings referred claimant to Dr. Camden Whitaker. Claimant received a steroid shot in his neck, which gave him no relief. On August 16, 2010, claimant underwent surgery to fuse his cervical spine at C4, C5 and C6. Claimant filed his Application for Hearing on August 27, 2010, in which he claimed an injury or injuries on or about May 7, 2010, and each and every working day thereafter. He stated the cause of his injury or injuries to his "neck, right shoulder and upper extremity and all parts affected thereby" was "repetitive overuse while performing normal job duties."[4]

Claimant saw Dr. Edward Prostic on October 11, 2010, at the request of claimant's attorney. Dr. Prostic attributed claimant's injury to a single date of accident of May 7,

[4] Form K-WC E-1, Application for Hearing filed Aug. 27, 2010.

2010.[5] Dr. Billing's office records include a note dated May 18, 2010, indicating claimant's caseworker called asking if claimant's problem came from a "year of manual labor."[6] The response from Dr. Billings' office was, "This can be the cause in some cases but unlikely."[7]

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 2009 Supp. 44-508(d) states in part:

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing.

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the

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[5] P.H. Trans., Cl. Ex. 2 at 4.

[6] P.H. Trans., Resp. Ex. B.

[7] *Id.* This note was authored by Melissa Wolf, who is unidentified but appears to work in Dr. Billings' office in some capacity. It appears it may have been written after Ms. Wolf conferred with Dr. Billings.

> employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[9]

ANALYSIS

Claimant described an incident occurring at work on May 5, 2010, where he heard a pop. Although he was not in pain, claimant knew this could be an injury, and he knew it was work related. By the next day, claimant was in pain. He also had numbness. Claimant did not report his injury until May 7 but despite his admitted belief that it was work related, claimant said nothing to indicate such to his employer. After seeing his personal physician on May 7, claimant was aware that his injury was potentially significant. Yet again claimant chose not to report his work-related accident to his employer, not even when he met with his supervisors on May 10 and was given light duty or when he was taken off work. Claimant did not ask his employer to provide medical treatment, instead choosing to seek medical treatment on his own. When taken off work by his doctor, claimant asked for and received FMLA, not workers compensation. It was not until after claimant's FMLA leave was exhausted and he was terminated that claimant reported his injury as work related and requested workers compensation benefits.

There is little evidence that claimant suffered any work-related aggravation after his initial May 5, 2010, accident. He only worked at his regular job duties two or three days after that initial accident date, and claimant said himself that he did not do anything to aggravate his condition. This Board Member finds that claimant sustained a single

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[8] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. __, (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[9] K.S.A. 2009 Supp. 44-555c(k).

accident on May 5, 2010, and not a series of accidents. Respondent's knowledge of claimant's injury is not knowledge of a work-related accident. Claimant first gave his employer notice that his accident and injury were work related on or about August 27, 2010. This was obviously more than the 10 days after the accident that notice is required to be given under K.S.A. 44-520 and is also more than the 75 days that is allowed where the failure to give notice within 10 days is due to just cause. No just cause has been shown to exist in this case, however. And because claimant's accident and injuries have not been shown to be due to a series of events, repetitive use, cumulative traumas, or microtraumas, the date of accident determination formula provided for in K.S.A. 2009 Supp. 508(d) does not apply.

CONCLUSION

(1) Claimant suffered a specific accident and injury on May 5, 2010.

(2) Claimant failed to give respondent timely notice of his accident.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Bruce E. Moore dated November 8, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2011.

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HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Anemarie Mura, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge